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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

DAVID T. FLAHERTY, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

REPLY BRIEF FOR THE FEDERAL APPELLANT

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1. In our opening brief (at 23-29), we showed that the district court correctly resolved the threshold

question of statutory construction presented in this case. As the court held, 42 U.S.C. (Supp. III) 602 (a)(38) clearly requires that all co-resident minor siblings be included in the filing unit when the family applies for AFDC, and that any countable income of such persons, including child-support income, be treated as "family income" in determining the family's AFDC eligibility and level of benefits. We showed that this construction of the statute is supported by its legislative history, which explains that while under preexisting law "a family might choose to exclude a child who is receiving * * * child support payments," the newly-enacted Section 602(a)(38) "will end the present practice whereby families exclude members with income in order to maximize family benefits." 1 Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. 98-169, Deficit Reduction Act of 1984*, at 980 (Comm. Print. 1984) [hereinafter *S. Prt. 98-169*]. We explained that these views of the Senate Finance Committee are entitled to considerable weight, since the House bill had no comparable provision, and since the Conference Report adopted the Senate version without substantial change.

In the district court, appellees advanced several statutory-construction arguments, the gist of which was that Congress had not meant to mandate the inclusion of child-support recipients in the filing unit *at all*. We showed in our opening brief (at 25-28) that these arguments were erroneous, and appellees have largely abandoned them here. Appellees now seem to concede that Congress *did* mandate the inclusion of child-support recipients in the filing unit (see Br. 22, 28, 46-47), and that the statute "clearly requires that *some sort of adjustment* be made in an AFDC grant when there are supported children in

a household" (*id.* at 28 (emphasis added)). Appellees assert, however, that the statutory language is "vague" and "opaque," and that it "provides little guidance as to what that adjustment is to be" (*ibid.*). Appellees then proffer two alternative constructions (*id.* at 45-58), the thrust of which is that Congress did not intend to treat *all* of the child-support income, but only some of it, as "family income" for AFDC purposes.

Appellees' argument fails for three principal reasons. First, the language of Section 602(a)(38) is not at all unclear. It says that a state, "in making the determination under [42 U.S.C. (Supp. III) 602 (a)(7)] with respect to a dependent child," shall include co-resident minor siblings in the filing unit, and that "*any income* of or available for such [siblings] *shall be included* in making such determination" (emphasis added). Section 602(a)(7) in turn provides that a state, in determining the need of a dependent child for aid, "shall * * * take into consideration *any other income* * * * of any child or relative claiming [AFDC], or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child" (emphasis added). Nether Section makes any distinction between child-support income and other sorts of income inuring to a co-resident sibling. Both Sections speak comprehensively, mandating the inclusion of "any income" and "any other income," respectively. And the effect of including child-support income in the "determination" made under Section 602(a)(7) is that such income, like the rest of the family's countable income, affects the amount of the family's AFDC benefits more or less dollar-for-dollar. That is because

the amount of benefits paid to the family is based on the difference between the family's countable income and the maximum AFDC grant level prescribed by the state. See U.S. Br. 7. Thus, the statutory language simply leaves no room to segregate child support into "includable" and "excludable" components, as appellees' argument would require.

Second, even if the statutory language were thought to be ambiguous, that would be the classic situation in which the courts should defer to a reasonable construction of the statute by the agency charged with administering it. The Secretary by regulation has construed the statute in the manner we believe to be correct (45 C.F.R. 206.10(a)(1)(vii)), and the district court, like almost every other court (see U.S. Br. 5-6 n.2), has sustained the validity of that regulation. Appellees themselves do not contend that the Secretary's construction of the statute is implausible or unreasonable; indeed, appellees' construction requires a tortured reading of the statutory language and legislative history while ours does not. Even if the statute were thought susceptible of diverse interpretations, therefore, settled principles of statutory construction would require that the Secretary's interpretation, not appellees', be adopted.

Third, appellees' proposed construction of Section 602(a)(38) has no anchor in the text or legislative history of the statute, and it would be utterly unworkable in practice. On appellees' view (Br. 52-53), the state agency, in fixing the AFDC benefit level, would apparently have to make a case-by-case determination of the extent to which families with child-support recipients actually *do* share their income and expenses. This in turn would require the

state either "to inquire into the manner in which AFDC parents are utilizing child support funds" (*id.* at 54), or to make "an economy of scale adjustment in the grants of AFDC applicants living with non-AFDC siblings" (*id.* at 58). But this is precisely the sort of argument that this Court rejected in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986). The Court there explained, in an analogous Food Stamp context, that "the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrants the use of general definitions in this area" (slip op. 5-6 (footnotes omitted)). In the present context as well, Congress plainly intended to adopt, and in Section 602(a)(38) did adopt, a *standard* filing unit provision. That provision does not contemplate ad hoc investigations into how families spend their money; rather, it proceeds from the generalized premise that family members who live together share their expenses, and it therefore requires that the countable income of all such family members be "recognized and counted as available to the family as a whole" (*S. Prt. 98-169*, at 980). As this Court has often stated, general rules of this sort "are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

2. Appellees focus their constitutional argument, as they did in the district court, on the Takings Clause. They contend that Section 602(a)(38), in conjunction with the pre-existing assignment provision, has the effect of "seizing" the co-resident sibling's child support, transmuting that money into AFDC benefits, and returning the money in the form

of public assistance to the family. Appellees assert that the statutory scheme thus "takes" the child support and uses it to discharge the governmental purpose of assisting the rest of the family, in defiance of the child's supposed state-law right to exclusive use of his money.

As we noted in our opening brief (at 32-33), and as North Carolina explains at greater length in its reply brief, appellees' takings claim fails because its state-law premise is false. A child-support recipient under North Carolina law does not have an absolute property right to unrestricted personal use of those funds. Rather, the child's absent parent has an *obligation* to pay child support, and the child's custodian has an *obligation* to use the money in the best interests of the child. North Carolina law explicitly permits the custodial parent to assign child support for the purpose of securing AFDC benefits, and state law thus contemplates that the best interests of the child can be furthered by an assignment that enables the mother to obtain AFDC for the entire family. Contrary to the premise of appellees' argument, therefore, a mother does not violate her fiduciary duty to her child by assigning his child support to the state, provided she reasonably concludes that the family as a whole will be better off if she does so.

3. Although appellees' Takings Clause challenge lies against Section 602(a)(38), they devote their attention principally to the assignment provision (42 U.S.C. (Supp. III) 602(a)(26)), which was enacted almost ten years earlier. The reason for this is not hard to see. By concentrating on the assignment provision, appellees try to lend color to the idea that the government has taken something away from the child, then returned to him a ratable portion of a family AFDC grant, a portion that is smaller than

the child support given up. In this way, appellees seek to depict a "taking" with an inadequate quid pro quo.[1]

As we explained in our opening brief (at 33-35), this mode of viewing the situation is misguided. The assignment provision itself works no financial detriment to the family. It operates merely as the procedural mechanism by which child-support income is taken into account in determining the family's AFDC eligibility and benefits. The assignment provision does not cause the family's AFDC grant to be any different than it would have been if (1) the family had actually received the child support and (2) the child support had been included in the family's income for purposes of determining the size of its grant. Indeed, the assignment provision can only

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[1] As we have explained (U.S. Br. 12-13, 31), the assignment provision does not apply only to children whose noncustodial parents are actually honoring their child-support obligations. The provision imposes, as a condition of eligibility, that "each applicant" for AFDC must assign to the state "any rights to support * * * which have accrued," and to cooperate with the state in establishing paternity and in obtaining support payments. 42 U.S.C. (Supp. III) 602(a)(26). When Congress amended the statute in 1974, it recognized that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents." S. Rep. 93-1356, 93d Cong., 2d Sess. 42 (1974). In the first ten years following enactment of that provision, legal paternity was established for more than 1.5 million children, more than 3.5 million support orders were established and $6.8 billion in support obligations was collected on behalf of children in AFDC families. 1 Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, *A Decade of Child Support Enforcement 1975-1985: Tenth Annual Report to Congress for the Period Ending September 30, 1985*, at iii, 6, 9-10 (1985).

help the family, not only because it relieves the family of the burden of collecting from the absent parent, but also because it gives the family the benefit of the child support (via an equivalent dollar amount of AFDC benefits) even if the child support is in fact uncollectible.

Under a proper Takings Clause analysis, therefore, the inquiry here should be exactly the same as if there were no assignment provision, and if Congress had simply mandated that child support be included upon receipt as "family income" for AFDC purposes. In that event, the child-support recipient would more easily be seen to "keep" all of his child support, and it would be apparent that Congress had simply determined to cut AFDC benefits to the rest of the family. There surely would be no "taking" under that scenario, since it then could not be argued that anything had been "taken" from the child-support recipient, and since the other family members whose benefits were cut could assert no constitutional entitlement to a permanently-fixed welfare grant. And if there would be no "taking" in the absence of the assignment provision, there cannot rationally be thought to be a taking when the same economic result is produced by the assignment provision's operation.

4. Although appellees naturally craft their argument in terms of child-support income, the logic of their Takings Clause theory would necessarily apply to any sort of income received by the siblings of a needy child. A co-resident minor sibling may have many types of income other than child support. He may have unearned income, such as social security survivors' benefits (see *S. Prt. 98-169*, at 980) or interest on a savings account. Or he may have

earned income from a part-time or full-time job.[2] On appellees' theory, it would be unconstitutional for Congress to require that *any* income of an arguably self-sufficient minor—be it income from a paper route, from shovelling snow, or from working at McDonald's—be counted as "family income" for purposes of determining the family's need for public assistance.

This obviously cannot be the law. Appellees' theory violates common sense, for it ignores the fact, drawn from human experience and recognized by Congress (*S. Prt. 98-169*, at 980), that members of subsistence-level families who live together, who are bound together by close emotional ties, typically regard their income and expenses, their resources and responsibilities, as shared. Appellees' theory, moreover, would disable Congress from enacting any sort of reasonable, needs-based eligibility requirements for the AFDC program. This Court has emphasized that the AFDC program provides for a "*family* grant" (*Dandridge* v. *Williams*, 397 U.S. 471, 477 (1970) (emphasis in original)).[3] No sensible allocation of

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[2] Congress has provided by statute (42 U.S.C. (Supp. III) 602(a)(8)(A)) that most types of earned income of minors is to be disregarded for AFDC purposes, in order to provide an incentive for such individuals to work. That exception, however, is a matter of legislative policy, not constitutional entitlement. In order to understand the logical reach of appellees' constitutional argument, therefore, one may assume for the moment that the statutory exception for earned income had not been enacted.

[3] Appellees assert (Br. 32-33) that "AFDC * * * remains as it was prior to 1984 a statutory scheme which focuses on individuals." As the quotation from *Dandridge* v. *Williams* shows, appellees' characterization of the AFDC program is inaccurate. Indeed, the program's acronym stands for "Aid *to Families* with Dependent Children." See U.S. Br. 6 n.3.

AFDC benefits can be made unless the incomes of the family's members can be considered in determining how large that grant should be.

5. Appellees make two other points that may be answered briefly:

a. Appellees liken Section 602(a)(38) to various "deeming" provisions of the social security laws (Br. 24, 48-49). These provisions "deem" a specified portion of the income of another person who is not seeking AFDC assistance—*e.g.*, a grandparent (42 U.S.C. (Supp. III) 602(a)(39)) or an alien sponsor (42 U.S.C. (& Supp. III) 615)—as being available to an AFDC applicant. Appellees contend that child support, as a matter of state law, is not in fact "available" to the rest of the child's family, and hence that Section 602(a)(38) violates the "availability principle."

Contrary to appellees' contention, this is not a "deeming" case. Section 602(a)(38) requires that the child-support recipient be included in the family filing unit. The child's income is then included in the family's aggregate income for purposes of calculating benefits for the unit, of which he is a part. The child-support income is not "deemed" available to anyone; it *is* available to the child-support recipient, and he *is* a member of the filing unit seeking assistance. The statute is thus completely consistent with the "availability principle."

b. Appellees contend (Br. 85) that the statute "impose[s] on the mother a Sophie's choice, requiring her to choose to sacrifice the financial interests of one child in order to protect the interests of the others." This dilemma is said to follow from the fact that, if the mother refuses to assign the child-support recipient's income to the state, "she and her indigent child will be denied even the absolute necessities required

for survival" (*ibid.*). Amicus ACLU similarly states (Br. 22-23) that a mother's refusal to assign child support results in the whole family's becoming ineligible for AFDC benefits.

These statements are erroneous. As a leading commentator has pointed out, "[a]n applicant who refuses to assign support rights or who does not agree to cooperate in securing support payments will be denied AFDC payments for herself, *but not for her children.*" H. Krause, *Child Support in America: The Legal Perspective* 322 (1981) (emphasis added). The Secretary's regulations specifically provide for that result (45 C.F.R. 232.11(a)(2)), and we understand that North Carolina's practice conforms to this model.

Thus, if a custodial parent with three children (one of whom receives child support, and two of whom do not) applies for AFDC but refuses to assign the child support, the result will be that the family receives assistance as a unit of three (the children only, with the mother being excluded). The three-person unit will then receive an AFDC grant sufficient to bring its income (viz., the child-support income) up to the state's maximum grant level for a unit of that size, and will in addition receive the $50 child-support "disregard" provided by 42 U.S.C. (Supp. III) 602(a)(8)(A)(vi) and 657(b)(1). See U.S. Br. 14.

This hypothetical family, of course, would be better off if the child support had been assigned to the state and the mother had remained in the filing unit, since the family would then be a filing unit of four entitled to a larger AFDC grant. The point is simply that, even if one adopts appellees' proposed method of accounting under which the child-support recipient is viewed as a self-sufficient and autonomous economic unit, that child can "keep" his full child support with-

out necessarily cutting off AFDC assistance to his brothers and sisters. This result demonstrates, once again, that Congress did not take anyone's property when it enacted Section 602(a)(38). Rather, Congress simply cut AFDC benefit levels based on a finding that certain families, because of their members' separate incomes, are less needy than other families whose members do not have any (or as much) such income.

For these reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded with instructions to vacate the injunction and dismiss the complaint and the third-party complaint.

Respectfully submitted.

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